

FILED BY CLERK

JAN 12 2012

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	2 CA-CR 2011-0283-PR
)	DEPARTMENT B
Respondent,)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 111, Rules of
MARK ANTHONY LUGO,)	the Supreme Court
)	
Petitioner.)	
_____)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR35437

Honorable Jan E. Kearney, Judge

REVIEW GRANTED; RELIEF DENIED

Barbara LaWall, Pima County Attorney
By Jacob R. Lines

Tucson
Attorneys for Respondent

Mark A. Lugo

Florence
In Propria Persona

K E L L Y, Judge.

¶1 After a jury trial, petitioner Mark Lugo was convicted of sexual conduct with a minor, sexual abuse, child molestation, and attempted sexual conduct with a minor. For these dangerous crimes against children, he was sentenced to consecutive

prison terms of twenty years, fifteen years, life (with the possibility of release after thirty-five years), and ten years. In this petition for review, Lugo challenges the trial court's order denying relief in what appears to have been his fourth post-conviction proceeding pursuant to Rule 32, Ariz. R. Crim. P. Absent a clear abuse of the trial court's discretion to decide whether post-conviction relief is warranted, we will not disturb its ruling. *State v. Watton*, 164 Ariz. 323, 325, 793 P.2d 80, 82 (1990).

¶2 On appeal, we affirmed Lugo's convictions but remanded the case to the trial court to address certain sentencing errors on counts two and three. *State v. Lugo*, No. 2 CA-CR 92-0561 (memorandum decision filed Jan. 31, 1994). Lugo was resentenced and did not appeal the resentencing. But it appears he sought post-conviction relief pursuant to Rule 32, Ariz. R. Crim. P., in three proceedings before this one. We granted partial relief on review of one such proceeding, *State v. Lugo*, No. 2 CA-CR 2007-0336-PR (memorandum decision filed Apr. 30, 2008), but we denied relief in two others, *State v. Lugo*, No. 2 CA-CR 2009-0201-PR (memorandum decision filed Dec. 2, 2009), and *State v. Lugo*, No. 2 CA-CR 2011-0041-PR (memorandum decision filed May 19, 2011). This petition for review followed the trial court's denial of relief in September 2011 of Lugo's fourth petition for post-conviction relief.

¶3 In its minute entry dated September 22, 2010, in Lugo's third post-conviction proceeding, the trial court reviewed the history of the case up to that point and described with great specificity the claims Lugo was raising, including claims of newly discovered evidence and actual innocence. Those claims were based on alleged instances of misconduct by former Pima County Prosecutor Kenneth Peasley. Rejecting Lugo's

claims, the court noted that Kathleen Mayer, not Peasley, had been the prosecutor in Lugo's case. In its September 2, 2011, order entered in this post-conviction proceeding, the court referred to the September 22, 2010, ruling for the history of Lugo's case and then identified the claims Lugo was raising in this proceeding: actual innocence; ineffective assistance of trial and appellate counsel based on the "'manufacturing of evidence and prosecutorial perjury,' in connection with the disclosure of two trial witnesses"; unlawful arrest and confinement in another cause, which was dismissed; failure of the court to admit certain medical records at trial; newly discovered evidence based on evidence "manufactured and introduced by the prosecutor"; and ineffective assistance of trial counsel in connection with case investigation and plea offers.

¶4 The trial court rejected each claim Lugo had raised, correctly concluding the claims were precluded because they had not been but could have been raised in any of the previous post-conviction proceedings or on appeal, or had been raised and had already been adjudicated. *See* Ariz. R. Crim. P. 32.2. Lugo is mistaken to the extent he is suggesting on review that claims of newly discovered evidence and actual innocence pursuant to Rule 32.1(e) and (h), respectively, are excepted entirely from the rule of preclusion and may be raised at any time. Although Rule 32.2(a) does not apply to claims under Rule 32.1(e) and (h), when such a claim is raised in a successive proceeding, such as here, the notice is subject to summary dismissal unless the defendant establishes "meritorious reasons . . . why the claim was not stated in the previous petition." Ariz. R. Crim. P. 32.2(b).

¶5 Nor has Lugo persuaded us that, because he was tried and convicted before 1992, Rule 32 as it existed before the 1992 amendments applies to all post-conviction proceedings filed after that date. We disagree with Lugo that at this juncture, no court can deem waived any claim that he failed to raise in the post-conviction proceedings that preceded the current one unless that waiver was knowing, voluntary and intelligent, as provided in former Rule 32.2(a)(3). Among other changes to the rule in 1992, the requirement that a claim be “[k]nowingly, voluntarily and intelligently not raised” in order to be precluded was stricken. *See* 170 Ariz. LXVII (1992). As we previously noted, it appears Lugo initiated three post-conviction proceedings before this one, all of which post-dated the 1992 amendments to the rules. In any event, we do not believe our supreme court intended under any version or construction of the rule to permit a defendant to raise in a fourth post-conviction petition claims that could have been raised in the first three.

¶6 The comment to the current version of Rule 32.2 explains that, although certain constitutional rights cannot be waived unless that waiver is knowing, voluntary and intelligent, “it is not the correct standard of waiver for other trial errors.” Ariz. R. Crim. P. 32.2 cmt. “Accordingly, some issues not raised at trial, on appeal, or in a previous collateral proceeding may be deemed waived without considering the defendant’s personal knowledge, unless such knowledge is specifically required to waive the constitutional right involved,” in other words, if the “claim is of sufficient constitutional magnitude.” *Id.*; *see also State v. Swoopes*, 216 Ariz. 390, ¶ 21, 166 P.3d 945, 951 (App. 2007). We reject Lugo’s suggestion, however, that his claims are of such

significant constitutional magnitude that they could be raised for the first time in this successive post-conviction proceeding despite the fact they could have been raised in previous proceedings. *See Swoopes*, 216 Ariz. 390, ¶¶ 26-39, 166 P.3d at 953-57 (claims of sufficient constitutional magnitude cannot be waived absent knowing, voluntary, and intelligent personal waiver).

¶7 None of the arguments Lugo raises in his petition for review provide any ground for disturbing the trial court’s well-reasoned and correct ruling. And “[n]o useful purpose would be served by . . . rehashing the trial court’s correct ruling in a written decision.” *State v. Whipple*, 177 Ariz. 272, 274, 866 P.2d 1358, 1360 (App. 1993). We therefore adopt the court’s ruling. *Id.*

¶8 Although we grant the petition for review, we deny Lugo’s request for relief.

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge

CONCURRING:

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge